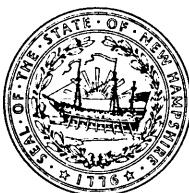


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JUL 25 1988

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July 8, 1988

Mr. Stephen M. Kennedy, Commissioner
Department of Administrative Services
State House Annex
Concord, New Hampshire 03301

Re: Disposition of Funds Pursuant to Chapter 399:10,
Laws of 1987

Dear Commissioner Kennedy:

You have requested our opinion as to the appropriate year-end disposition of unused funds authorized for payment by the Treasurer in lieu of bond issues, pursuant to Chapter 399:10, II, Laws of 1987. You have asked whether these funds ought to be considered restricted amounts, available solely for payment in lieu of bonds, or whether the funds now should be considered part of the unrestricted general fund balance, available to be appropriated for any lawful purpose. It is our opinion that the authority granted to the State Treasurer by Chapter 399:10, II does not amount to an exclusive appropriation, but rather grants to the Treasurer the discretion to apply certain otherwise unexpended or unobligated amounts as direct payment for capital improvements for which sums were appropriated during the 1987 legislative session. There is, therefore, no legal impediment to including the subject funds in the unrestricted general fund balance.

Chapter 399, Laws of 1987 sets forth various appropriations for capital improvement projects for a number of state departments. The legislature anticipated that the appropriations would be funded from state, federal, local and other sources. Ch. 399:14, 399:16, Laws of 1987. To fund the state share of some of these appropriations, Ch. 399:10, I

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permits the State Treasurer to borrow upon the credit of the State, and to issue bonds and notes for that purpose. In addition to this borrowing authority, Ch. 399:10, II provides:

The state treasurer, with the prior approval of the fiscal committee and governor and council, is hereby authorized to utilize 50 percent of any general fund revenue which is in excess of \$524,3200,000 for fiscal year 1987, \$540,820,000 for fiscal year 1988, and \$556,020,000 for fiscal year 1989, as determined by the official audit performed pursuant to RSA 21-I:8, I(h) at the close of each fiscal year for the purpose of providing funds authorized by paragraph I in lieu of issuing bonds.

Although this section has some looseness in it, we do not believe it was intended as an exclusive appropriation, requiring the establishment of a restricted fund. Instead, it is only an authorization for the Treasurer to make payments up to certain amounts to be calculated as provided in the section itself. Operating as an authorization to pay, the section is similar to the authority granted, for example, to the Treasurer by RSA 6-A:5 (cash advances in lieu of anticipation notes), to the Governor and Council by RSA 7:12 (employment of assistants by the Attorney General), to the Governor by RSA 9:13-d (civil emergency), and to the Governor by RSA 224:19 (forest fire expenses). These statutory provisions allow the expenditure of otherwise unappropriated funds under terms and conditions set by the legislature. Ch. 399:10, II provides the Treasurer, with the prior approval of the Fiscal Committee and Governor and Council, similar discretion. She may make direct payments in lieu of the issuance of bonds relating to capital improvements authorized during the 1987 legislative session. The amount of payment, however, cannot exceed the amount calculated under the provisions of section 10, II. Moreover, the Treasurer or the approval authorities may decide not to apply any of the authorized amount. In such event, we do not find an intention, fairly expressed in the chapter, that the amount is indefinitely unavailable for use as otherwise unappropriated funds.

In point of fact, the legislature has itself limited the authority of the Treasurer, by enacting Chs. 224, 240, and 254. The amount originally calculated as excess revenue for fiscal

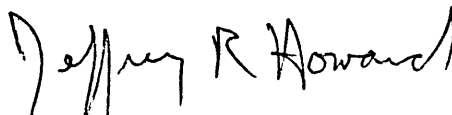
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year 1987 was \$6,982,000. During the 1988 legislative session, \$2,028,000 of this amount was obligated to fund four unrelated appropriations. Laws of 1988, Ch. 224:23 and 26, Ch. 240:2, II, Ch. 254:72. As a result of this legislation, the Treasurer's authority to expend excess revenue from fiscal year 1987 was limited to \$4,954,000.

Because there is no language in Ch. 399:10, II, Laws of 1987 (amended as to amounts by Ch. 254:83, Laws of 1988) indicating that the funds were to be nonlapsing (see RSA 9:13-e, effective July 1, 1987, establishing a nonlapsing revenue stabilization reserve account), and because the legislature has itself recognized that funds identified in Ch. 399:10, II may be used for other authorized purposes, it is our opinion that the \$4,954,000 should not be carried beyond June 30, 1988 in a restricted account, but should be considered available for any authorized general fund purpose.

We are not here presented with the question whether the Treasurer continues to be authorized to expend the amount calculated for fiscal year 1987, despite our conclusion that the funds are available for other uses. We are doubtful of the Treasurer's continuing authority, but we are of the opinion that this question is better answered at such time as the issue is presented in a factual context.

Very truly yours,



Jeffrey R. Howard
Deputy Attorney General

JRH/der
88-30